

Issues: Group II Written Notice (failure to follow policy/instructions), and Termination (due to accumulation); Hearing Date: 04/15/15; Decision Issued: 04/16/15; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case No.10561; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10561**

Hearing Date: April 15, 2015  
Decision Issued: April 16, 2015

#### **PROCEDURAL HISTORY**

On February 10, 2015, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy.

On February 10, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 3, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 15, 2015, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

#### **APPEARANCES**

Agency Counsel  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Christopher Newport University employed Grievant as an Apparel Worker/Housekeeping. She began working for Agency approximately 3.5 years. Grievant had prior active disciplinary action. She received a Group II Written Notice on August 8, 2014 for failure to follow policy. She received a Group I Written Notice on September 30, 2014.

Grievant knew that she was obligated to obtain her supervisor's permission to be absent from work. She was counseled regarding the importance of notifying a supervisor when she would be tardy or absent from work. On September 21, 2014, Grievant was given a notice form the Supervisor stating, "If you will be late or absent, call my cell phone [number]".<sup>1</sup>

Grievant was scheduled to work on January 11, 2015 and January 18, 2015. She did not report to work on these days. She did not call the Supervisor to notify the supervisor that she would not be working that day. She did not have the permission of a supervisor to be absent from work.

---

<sup>1</sup> Agency Exhibit 3.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>2</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[F]ailure to report to work without [proper notice]” is a Group II offense. Grievant was obligated to report to work on January 11, 2015 and January 18, 2015. She did not report to work on those days. She did not contact a supervisor to obtain permission to be absent on those days. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant had prior active disciplinary action including a Group II Written Notice. With the accumulation of the Written Notice giving rise to this grievance, Grievant has accumulated two Group II Written Notices. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

In her written request for appeal, Grievant provided several defenses to the disciplinary action and asserted she had been discriminated against. Grievant did not appear at the hearing and no evidence was presented to support her assertions. There is no reason for the Hearing Officer to believe that the Agency discriminated against Grievant.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management ....”<sup>3</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

---

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>4</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.